DOCUMENT RESUME

ED 262 857 PS 014 702

AUTHOR Lines, Patricia M.
TITLE Treatment of Religion in Public Schools and the Impact on Private Education.
INSTITUTION Education Commission of the States, Denver, Colo.
SPONS AGENCY Carnegie Corp. of New York, N.Y.; Department of Education, Washington, DC.; Spencer Foundation, Chicago, Ill.
REPORT NO LEC-84-1
PUB DATE Sep 84
NOTE 64p.
PUB TYPE Viewpoints (120)

EDRS PRICE MF01/PC03 Plus Postage.
DESCRIPTORS Catholics; Conflict; Constitutional Law; Court Litigation; *Educational History; Educational Trends; Elementary Secondary Education; Enrollment Influences; Federal Legislation; *Private Schools; Protestants; *Public Schools; *Religion; *Social Change; *State Church Separation; Values
IDENTIFIERS *Secularism

ABSTRACT

This paper explores major historical changes in public school values from colonial times to the present and describes the ways such changes have affected private education. Emphasized are values based on religious premises, values that affect the religious beliefs of others, and the impact of both types of values on decisions to leave public schools and affiliate with or establish private schools. Specific topics addressed include (1) the religious prototype for public schools; (2) religious public schools and compulsory education; (3) the impact of private education; (4) public response to successful private schools; (5) the nondenominational movement; (6) early secular influences; (7) persistence of the sectarian and nondenominational religious ethic; (8) the role of the Constitution; (9) religion and the public school today; and (10) impact on private schools. The discussion subsequently focuses on shifts within the private school population, trends in litigation, trends in legislation, and sources of tension between public and private schools. Generally, it is asserted that, while the public schools at the beginning of the 20th century reflected evangelical, Protestant values, today they reflect mostly secular values. The sharp rise in litigation over state regulation in private schools in the 1980s is seen as evidence of new tension between public and private education. It is expected that the courts and legislatures will accommodate Christians who choose to educate their children in private schools. (RH)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
X This document has been reproduced as received from the person or organization originating it.
Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

ED262857

TREATMENT OF RELIGION IN PUBLIC SCHOOLS AND THE IMPACT ON PRIVATE EDUCATION

by

Patricia M. Lines*

Education Commission of the States
1860 Lincoln Street, Suite 300
Denver, Colorado 80295

PS 014702

LEC-84-1

September 1984

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
Education Commission of the States
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

This paper was prepared under a contract with the U.S. Department of Education, and was also partially supported by grants from the Carnegie Corporation and the Spencer Foundation. The views in this paper are the author's and do not necessarily reflect the views of these organizations.

CONTENTS

TREATMENT OF RELIGION IN PUBLIC SCHOOLS 1

INTRODUCTION 1

OVERVIEW 4

PUBLIC SCHOOL VALUES OVER TIME 6
The Religious Prototype for Public Schools 6
The Religious Public Schools 8
and Compulsory Education 8
The Nondenominational Movement 16
Early Secular Influences 18
Persistence of Sectarian and 19
Nondenominational Religious Ethics 19
The Role of the Constitution 20
Religion and the Public School of Today 22
The Impact on Private Schools 24

SHIFTS WITHIN THE PRIVATE SCHOOL POPULATION 26

TRENDS IN LITIGATION 29

TRENDS IN LEGISLATION 36

SOURCES OF TENSION 39

CONCLUSION 44

TREATMENT OF RELIGION IN PUBLIC SCHOOLS AND THE IMPACT ON PRIVATE EDUCATION

by

Patricia M. Lines

INTRODUCTION

Education is the transmission of ideas, culture and sacred beliefs; the state undertakes nothing more value laden. Because of this awesome potential for influencing the intellectual and moral development of future generations, democratic governments favor decentralized control of education institutions, and they tolerate private education efforts. Indeed, private schools in America have long been a refuge for those who differ with the value system explicitly or implicitly adopted in the public schools. This paper explores this very significant role of private schools.

This paper traces the major historical changes in treatment of religious values in public schools and the corresponding development of new private schools. Although the evidence is far from complete, there is much to support the theory that, when they alter their treatment of religion, public schools lose some pupils and gain others. Indeed, it appears that public school values have a major impact on the formation of new private

schools.

The potential public response, ranging from prohibition to support of these new schools, can be critical to their development. The tension between public and private education can be traced to the tension between cultural pluralism and the desire to establish a common cultural base. The historical inquiry here argues for accommodation of diversity. Because private education serves a valuable purpose in providing a place for those who dissent, less regulation rather than more seems best from the point of view of democratic thinking.

There are many things this article does not and cannot do. It does not, examine the constitutionality of state regulation of private education.[1] Tracing all the causes for shifts in private school populations is also beyond the scope of this article. Parents choose private schools for many reasons. They often consider the program, teachers, educational philosophy and many other factors unrelated to religious values. Nor should any of the discussion be taken as an argument in favor of public aid to private schools. That is an even more complex topic, and although the analysis may begin with how and why people choose private schools, it cannot end there. Whether aid (in any of its forms -- grants, loans, vouchers, tax benefits) is desirable must depend on many other factors. In any case the presence or absence of it does not seem to deter those who wish to form new schools for reasons of conscience. The emphasis here is on how changes in the

values reflected in the public school system produce dissenters, some of whom will leave that system to found their own schools or turn to home instruction.

OVERVIEW

Public school treatment of religious values have gone through three overlapping stages of development. First was an evangelical Protestant period, beginning with the development of public education and lasting well into the 19th Century. Next came a relatively brief period of nondenominatinal religious emphasis, an emphasis that never completely permeated American public education before it was overtaken by the third, and current era of secular education. Nondenominationalism still persists, particularly in the "Bible Belt" (a term that describes an ideological orientation not a geographical area) where political leaders sometimes continue to call for ecumenical prayer at the start of the school day or the posting of religious material such as the Ten Commandments. But the public schools have become officially secular, and mostly so in practice.

Along with these changes in religious orientation, public schools have changed in other ways, favoring inquiry over rote learning, emphasizing student development over acceptance of authoritarian sources, and extending the range of study to include sexuality, evolution, drugs and alcohol. But the reason these changes are controversial seems closely bound up with the religious beliefs and religious sensitivities of a diverse population.

The first and last periods of public school development profoundly affected nonpublic schools. The Protestant orientation of the early public schools directly motivated the Roman Catholic immigrants, who settled in the United States in the 19th Century, to found Catholic schools. In recent times, the official secularism of the public schools has motivated some fundamentalist Protestants to found their own private schools. The resulting shift in private school population from Catholic to non-Catholic schools has been dramatic.

Public response to the emergence of a strong private school movement has sometimes been hostile, affecting Catholic schools in the 19th and early 20th Centuries and fundamentalist Protestant schools now. This hostility gave rise to an attempt to close down private schools in the early part of this century. Today it gives rise to a sharp increase in litigation over standards and other aspects of the operation of private schools. A much welcome legislative trend toward accommodating private schools is now evident, and it should ultimately lessen litigation and reduce tension between the new schools and state officials.

PUBLIC SCHOOL VALUES OVER TIME

The Religious Prototype for Public Schools

The European Model

The European schools on which early American schools were patterned had a clear religious mission. Church-operated schools were the original norm, followed by government schools that were very similar in orientation. The founders of the state-operated schools, moreover, were able to compel attendance -- using the powers of government to pursue their personal vision for education. As early as 1524, for example, Martin Luther urged the rulers of German cities to establish schools and compel attendance[2] and, over the next 40 years, several rulers did in fact heed Luther's advice. The purpose of these public schools was to foster Lutheranism, to suppress religious dissent and to rear good citizens.[3] Luther's idea spread. In the mid-16th Century, as ruler of Geneva, John Calvin established a number of public schools and compelled attendance, an example Holland followed in the early 17th Century.[4]

The Early American Church School

The origins of public schooling in America can also be traced to church schools. Like the Europeans before Luther, the early

Americans relied almost exclusively on church-operated schools. These first American schools considered themselves "public," because they educated children and in other ways served the public good.[5] Bernard Bailyn, in Education in the Forming of American Society, has observed that "the very idea of a clean line of separation between "private" and "public," was unknown before the end of the 18th Century."[6]

To be sure, modern American education was also shaped by family training and by apprenticeships based on 16th Century English poor laws.[7] But explicit schooling efforts were made chiefly by churches that, as Bailyn observes, did not limit themselves to religious instruction:

> It [the church] furthered the introduction of the child to society by instructing him in the system of thought and imagery which underlay the culture's values and aims. It provided the highest sanctions for the accepted forms of behavior, and brought the child into close relationship with the intangible loyalties, the ethos and highest principles, of the society in which he lived.[8]

Bailyn cites the ineffectual attempt of English settlers to educate and convert native Indians. After giving up the attempt, colonists turned their missionary fervor inward: "For the self-conscious, deliberate, aggressive use of education, first seen in an improvised but confident missionary campaign, spread throughout an increasingly heterogeneous society and came to be accepted as a normal form of educational effort."[9] Thus, he notes that

> [s]ectarian groups, without regard to the intellectual complexity of their doctrine or to their views on the value of learning to religion, became dynamic elements in the spread of education, spawning schools of all sorts, continuously, competitively, in all their settlements, carrying education into the most remote frontiers.[10]

These proselytizing church-run schools, pursuing both educational and religious goals, became prototypes for the early American government school.

The Religious Public Schools and Compulsory Education

The Colonial Period

Colonial America ultimately followed Europe's lead and organized government-run, religious schools. The idea of compelling attendance also emerged fairly early. By the 17th Century, American laws often compelled education, explicitly citing both religious and economic needs.[11] In 1642, only a year after the Massachusetts Bay Colony began passing laws for its own governance, it enacted a compulsory literacy law,[12] enforced by apprenticing the truant to a master who would provide the required instruction.[13] The purpose, as in Luther's time, was to assure that children understood "the principles of religion and the capital law of the country."[14] Massachusetts enacted an amended law in 1648, which set specific fines for noncompliance and

expanded on the religious goals: a child should understand the capital laws and learn an orthodox catechism.[15] The amendments also required boys to be apprenticed until age 21 (girls until age 18) and provided for payments to masters from the town treasury.[16]

Other New England colonies followed suit.[17] The Plymouth Colony, in 1671, decided to fine parents and masters who failed to comply and, as a last resort, to place children in suitable apprenticeships.[18] In 1650, Connecticut modeled a law on the 1648 Massachusetts law, following it almost word for word.[19]

Not all colonies followed the Massachusetts example. Rhode Island resisted the trend.[20] In 1683 Pennsylvania adopted a poor law modeled after English law: everyone not gainfully employed was required to serve an apprenticeship.[21] The South, which proceeded at a slower pace, adopted laws resembling the English poor laws requiring apprenticeships for certain children, particularly the poor and illegitimate.[22] Not until the beginning of the 18th century did any true education laws appear in the South; those that appeared required only literacy.[23]

Outside the South interest in education waned in the latter part of the 17th century. Requirements were reduced until by the beginning of the 18th century, no laws remained to compel education in New England.[24] Historians attribute the diminished interest in education to social and economic dislocation following the Indian Wars of 1675-76, the general scattering of the

population into rural areas, the emphasis on material development in frontier conditions, and growing religious tolerance.[25] Before educational institutions could fully rebuild, they suffered another blow: the American Revolution, which totally disrupted the operation of most schools.[26]

Nonetheless, 19th century laws on education appeared to be modeled on earlier examples (only the apprenticeship idea was not carried forward), and new schools had a distinctly Protestant orientation.

The New Nation

Following the Revolution, the United States became intensely interested in education as a means of eradicating class distinctions and fostering the values of the new nation. In 1789 the new state of Massachusetts enacted a statewide school law requiring all towns of at least 50 families to support a school at least six months per year. Larger towns had even larger responsibilities, and rural areas were included within district systems.[27]

The compulsory education laws as we know them today were developed in a period beginning in 1852 and ending in 1918. In 1852, Massachusetts, again the leader,[28] mandated that any person responsible for a child send the child to school for 12 weeks a year, 6 of which were to be consecutive. Vermont, New Hampshire

and Connecticut soon followed suit. As in the colonial period, Rhode Island lagged behind other New England states, perhaps because it had been established as a religious haven, had only a weak central government, and emphasized individualism.[29] But by 1900, more than 30 states and the District of Columbia had adopted compulsory education laws. As in colonial days, the southern states were the last to act, passing compulsory education laws between 1900 and 1918.[30]

Public schools of the 19th Century espoused the same missionary goals as their private predecessors. As Michael Katz has observed, "it is in fact impossible to disentangle Protestantism from the early history of the common school . . . ."[31] Most historians of American education tend to agree.[32] To take just one example of this bias, more than 120 million McGuffey Readers, containing a strong Protestant orientation, were sold between 1839 and 1920.[33] Other textbooks were openly anti-Catholic; The New England Primer is a famous case in point.[34] The response of

To be sure, other threads appeared in the tapestry. The early public schools served only the very poor and were to this extent altruistic, but they also helped assure the stability of the upper class.[35] Advocates of public schools hoped to teach youth "proper subordination" and "to confide in and reverence their rulers."[36] Katz observes that the urban public school system was "founded to cope with the problems of urban living,

among which the threat of the urban poor had high priority."[37] Class and race bias were pervasive.[38] Religious, class, and race bias all worked together to alienate Roman Catholics.

The Impact on Private Education

Reactions to the new public, Protestant schools occurred along both class and religious lines. Not surprisingly, the people most opposed to the development of public education were its intended beneficiaries -- the working class and the Catholics (who were often the same people). The New York Workingmen's Party opposed the establishment of public schools,[39] while Catholics developed their own schools. The response of the Roman Catholics was stubborn opposition and in 1884 the Third Plenary Council of Baltimore declared its goal: "Every Catholic child in a Catholic school."[40] The political efforts to stop the development of public education failed; the private education efforts endured.

To be sure, Catholic schools existed before this time. So did private schools of many denominations -- Jewish, Lutheran, Episcopal, Quaker to name a few.[41] The Catholic schools did not dominate this group; they were few, probably because of the small numbers of Catholics -- only 1% of the population by the end of the Revolution.[42]

But with the establishment of Protestant public schools, the enactment of compulsory attendance laws, and the arrival of large numbers of Catholics -- all in the 19th Century -- this situation changed dramatically. Catholics were to dominate private education for over a century: From the middle of the 19th Century until the mid-1960s, well over 90% of the children in private schools were in Roman Catholic schools.[43]

This dominance was the product of many things. Prior to 1800, Catholics in America were generally affluent, Anglo-American, and moved easily among the bluebloods of the large eastern cities.[44] But the extraordinary immigration of poor Catholics[45] (largely Irish and German, with some Slavs, Italians and others) revived animosity towards Catholics. The sheer size of the immigration was bound to have an impact: within 50 years, Catholics went from a tiny minority to the single largest religious group in the nation.[46]

The compulsory education laws were in place by the time of the immigration to New York and secondary migration to other parts of the country. Laws designed to enlighten poor Protestant immigrants were now applied to the newcomers, and they were clearly uncomfortable with the biases present in the new public school system.[47] Most of the new immigrants were miserably poor -- too poor to leave the vicinity of Ellis Island. They settled in New York City where they lived in overcrowded, unsanitary conditions[48] and migrated north, south and west only after gaining

some small economic base.

The times were tumultuous. In 1844 riots broke out in Philadelphia over which version of the Bible should be used in the public school program.[49] Catholic leaders attacked the Protestant nature of the public schools, not only for the sake of Catholic children in those schools but also as an argument for state aid to the new Catholic schools. One official response was New York's Maclay Bill of 1842, which removed control of the public schools from the crusading Public School Society and attempted to secularize instruction;[50] the idea of private school aid was totally rejected.

Catholic leaders obtained more immediate relief with their alternative response: to bring most Catholic children into Catholic schools. The first Catholic elementary school, St. Peter's in New York, had been founded in 1800.[51] (It even received some financial assistance from the state until 1824.[52]) The first free coeducational parochial school had been founded in 1809.[53] But by mid-century, large numbers of new Catholic schools were being established, paralleling the development of public schools.

Public Reactions to Successful Private Schools

One public response to the new schools was hostility. While

the emergence of Catholic schools might have been seen as clear benefit to overcrowded public schools hard put to accommodate the large numbers of new immigrants, some people also saw the new schools as a threat to public schools. Also, substantial numbers of people saw the generally poor and overcrowded new schools[54] as undesirable, and even unpatriotic.

Thus, in the 1920s, a number of states sought to impose restrictions on private schools. The restrictions were not aimed exclusively at Catholic schools, but at German-language and Japanese-language schools as well.[55] Oregon even attempted to abolish all forms of private education. In 1922 the Klu Klux Klan, which had infiltrated the Scottish Rite Masons, campaigned successfully for a state wide referendum that modified Oregon's compulsory education law to require attendance at public schools only. The Klan exploited not only anti-Catholic sentiments but also anti-German sentiments fanned by popular reaction to the Great War. In a decision often hailed as a "bill of rights" for private schools, the Supreme Court struck this law down in Pierce v. Society of Sisters,[56] in 1925.

Following the tension of the 1920s, private schools enjoyed a period of relatively peaceful coexistence with public schools. Most of them resisted state standards for a while but in the end strove to meet them, wishing to be viewed as excellent by any standard, even a government standard. By the 1960s, most private schools had accepted most state requirements for their operation.

The Nondenominational Movement

The second response from public leaders was to reform public schools to make them more acceptable to religious minorities by replacing the traditional Protestant values of public schools with nondenominationalism. This effort even preceded the religious polarization of the 19th and early 20th centuries. As early as 1817, Thomas Jefferson submitted a draft of an "Act for Establishing Elementary Schools" to the General Assembly of Virginia which provided that "no religious reading, instruction or exercise, shall be prescribed or practiced inconsistent with the tenets of any religious sect or denomination."[57] In general, Jefferson favored nondenominational religious observances for public school, believing that there was a body of religious principles "common to all sects" that could be taught.[58]

Horace Mann advocated a very similar position. Giving up, temporarily, a promising political career to become secretary of the newly created Massachusetts Board of Education in 1837,[59] Mann was in a position of considerable influence. Motivated in large part by religious zeal, he strove to find a common denominator for all religious views. (The difficulty of such an endeavor is illustrated by the clear preference Mann showed for a Judeo-Christian approach. For example, he urged the "daily use of the Bible in school."[60]) Mann was, in fact, a Unitarian, as were

7 of the 10 members of his board,[61] and his public position coincided with his private beliefs. As Lawrence Cremin has wryly observed, Mann

> . . . . came increasingly to believe that certain common principles could be culled from the several sectarian creeds and made the core of a body of religious doctrine on which all could agree. For Mann, these were the great principles of "natural religion" -- those truths which had been given in the Bible and demonstrated in the course of history. The fact that this new corpus of knowledge closely resembled his own optimistic, humanistic Unitarianism did not seem to trouble him. Nor did questions about "which version of the Bible" from Catholic and Jewish citizens. If the Word of God -- personified in the King James Bible -- were taught without comment, how could that conceivably be sectarian? If the Fatherhood of God were taught as the foundation of the brotherhood of men, how could that be sectarian?[62]

Others also called for reform. Horace Bushnell, one of Hartford's leading ministers, prepared a lengthy tract on how to make public schools acceptable to Catholics. He argued that "[i]t is the responsibility of Protestants to do all they can to render it [the public program] acceptable to Roman Catholics, and the responsibility of Roman Catholics to respond by joining in the common venture instead of demanding their own schools."[63]

George Cheever, another advocate of compulsory education, exemplifies the narrow, bigoted view also typical of the era:

> We are in great danger from the dark and stolid infidelity and vicious radicalism of a large portion of the foreign immigrating population. . . . How can we reach the evil at its roots, applying a wise and conservative radicalism to defeat the working of malignant, social, anti-Christian poison? How can the children of such a population be reached, except in our free public schools?[64]

Jefferson and Mann were successful, but not in their lifetimes. The nondenominational movement slowly gained ground, particularly in the liberal East. The 1870 edition of the McGuffey Reader was dramatically altered. In the words of John Westerhoff, "Calvinistic theology and ethics have been replaced by American middle-class civil religion, morality, and values."[65] Meanwhile, other education leaders were taking the nondenominational movement one step further, and urging secularization of the public schools.

Early Secular Influences

In 1899, John Dewey wrote The School and Society, elaborating on the Jeffersonian concept of education in which religion had little or no place.[66] Cremin finds that the book marked a turning point: "By the turn of the century a revolution was clearly at hand, and progressives found themselves with a growing body of theory to support the pedagogical reformism they so dearly loved."[67] In 1918, the United States Bureau of Education published its famous Cardinal Principles for Secondary Education. The development of "ethical character" in students was one of seven objectives, but no mention was made of religious training.[68] In 1919, Stanwood Cobb formed "The Association for the Advancement of Progressive Education" (The PEA).[69] The PEA endorsed the following nonsectarian principles for education:

- o Freedom for children to develop naturally
- o Student interest as the motive for learning
- o The teacher as a guide, not a task-master
- o The scientific study of pupil development
- o Greater attention to all that affects children's physical development
- o Cooperation between school and home[70]

Persistence of Sectarian and Nondenominational Religious Ethics

All of these were harbingers of the move to secular education, but even more rigid sectarian influences remained. As late as 1955 a Buddhist parent in Massachusetts was convicted under the compulsory school attendance law for attempting home instruction; he had objected to the reading of the 23rd Psalm and recitation of the Lord's Prayer in the public school.[71] But nondenominational sentiments had generally prevailed by the mid-20th Century. Typical of the treatment of religion was the "Regent's Prayer" mandated by the state of New York as an opening

ceremony for all public schools. It was nondenominational, although theistic: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings, upon us, our parents, our teachers and our Country."[72] Protestant views may still have permeated rural and small-town public schools, but in Eastern and urban areas, opposition was growing to even this much religious orientation in public schools.

The Role of the Constitution

If American education had its roots in the church, and if its goal was originally to transmit a religious cultural heritage, how did the modern, secular public school emerge? The answer lies, inpart, in the Bill of Rights, which in the first amendment declares that "Congress shall make no law respecting an establishment of religion . . . ." Both the document and the political philosophy that gave birth to it profoundly affected education in the 20th Century. The growing heterogeneity of American society had an effect as well. But the Constitution was written for a hetereogeneous people.

To be sure, the first amendment had little legal impact on public schools for 100 years. For many years the question of whether the amendment applied to state government remained unresolved and, since state and local governments were responsible for education, the religious aspects of public education seemed

best left to state officials. The result was that treatment of religion in the schools varied, depending on how Jeffersonian views endured in particular regions. In 1925, however, the Supreme Court extended the prohibition of the first amendment to the states, reasoning that the due process requirements of the fourteenth amendment (which expressly applies to states) included the goals of the first amendment.[73] This decision gave the opponents of religion in public schools a powerful legal weapon.

In 1962, in Engle v. Vitale, the U.S. Supreme Court ruled that officially mandated prayer in the public schools was unconstitutional.[74] The following year, the Court ruled that the Bible could not be read in school as a religious exercise, although it could be studied for its literary, historic and social value.[75]

As is sometimes the case in major social issues, the Court was somewhat ahead of its time. Thus, response to its decisions was mixed. President John Kennedy urged Americans to support the Court's decision and observed in a press conference on June 27, 1962 that:

> . . . we have in this case a very easy remedy, and that is to pray ourselves. And I would think that it would be a welcome reminder to every American family that we can pray a good deal more at home, we can attend our churches with a good deal more fidelity, and we can make the true meaning of prayer much more important in the lives of our children . . . .

Some public officials ignored the Court's mandate and failed to take steps to end prayer in the schools.[76] Some parents instructed their children to pray in school on their own. When a New York school principal stopped kindergarteners from reciting a simple grace before cookies and milk, parents went to court. The U.S. Court of Appeals for the Second Circuit upheld the principal's decision in 1965, in Stein v. Oshinsky.[77] Troubled by the case and seeing it as a restriction on individual prayer, Senator Everett Dirksen of Illinois sought passage of a constitutional amendment to clarify this and similar court decisions. The Dirksen amendment ultimately failed, and the issue largely disappeared from national politics for more than a decade.

Religion and the Public School of Today

Political support for religion in the public schools seems on the rise again, and the issue has reappeared before the Supreme Court in the past five years. The result has been reaffirmation of the constitutional demand for secular public schools. In 1980 the Court struck down a Kentucky law enacted in 1978 that required posting of the Ten Commandments, finding that the purpose was to promote religion and not the discussion of social, historic, literary or other secular aspects of the commandments.[78] In early 1982 the Supreme Court struck down a Louisiana law calling for voluntary prayer in the schools.[79] (Unaffected by the Court's

decision was provision for silent meditation, a relatively secular policy when composed to nondenominational, state prescribed prayer.) The only ruling in the other direction is limited: in 1981, in Widmar v. Vincent, the Court upheld the right of college students to meet for religious purposes, basing its ruling on the "open forum" doctrine. Basing its analysis on the right to freedom of speech, the Court ruled that once a university became an "open forum" by making facilities available for a wide variety of activities, it could not then selectively close the forum based on content of what was to said.[80]

Thus, today, the Protestant orientation of the public schools has completely vanished and the nondenominational religious orientation is limited. Where strong political efforts are being made to continue a prayer as part of the daily program, such as in Alabama, that prayer is an ecumenical prayer acceptable to most theists.[81] The only religious objections might be that such a prayer fails to utilize a required convention, fails to be religious enough for specific religions, or that it is not always acceptable to nontheistic religions.

In other areas of the country, particularly in urban school districts, education leaders have written policies on how to deal with major holidays, often in consultation with a special citizens' group. Such policies generally recommend the presentation of secular aspects of holidays and cautious educational treatment of any religious material.[82] Santa Claus is

welcome at Christmas assemblies; sacred music must be presented in a context that emphasizes its educational, historical or cultural value. Such policies typically require attention to holidays of all major religions. Daily attention to religious matters is not contemplated.

Further, even relatively innocuous practices that some people regard as religious in nature, such as a moment of silence, are under fire.[83] For example, students have had to go to court to preserve their right to student-initiated religious activity, an activity that the Court has found protected by the first amendment's guarantee of free speech, in some circumstances.[84]

The Impact on Private Schools

Many Catholics may now regard public schools as safe for their children; some Protestants do not.[85] In fact, the change in the religious orientation of public schools coincides with shifts within the private school population: the Catholic school population has declined and the Protestant school population has increased. Cause and effect are problematic, and researchers have forwarded many reasons for the decline in the Catholic school population.[86]

But the people who have founded new Protestant schools in the past decade explicitly cite disagreement with the secular nature

of the public school.

The Christian school movement gets its impetus from the religious beliefs of its adherents. Many who are dismayed by the secularization of public schools want to reform public programs. Others accept the secularization of the public schools and seek to found new schools with a strong religious emphasis. They believe that these schools should not obtain approval from the state, arguing that the school is an extension of the church and that teachers are like missionaries or pastors. The significance of the point is illustrated by the fact that a recent fact-finding panel in Nebraska, appointed by the governor, began its report by describing this set of beliefs.[87] This idea has been attributed to David Gibbs, a pastor and an attorney involved in some of the litigation on this issue.[88] However, the idea is now widely accepted by participants in the movement[89]

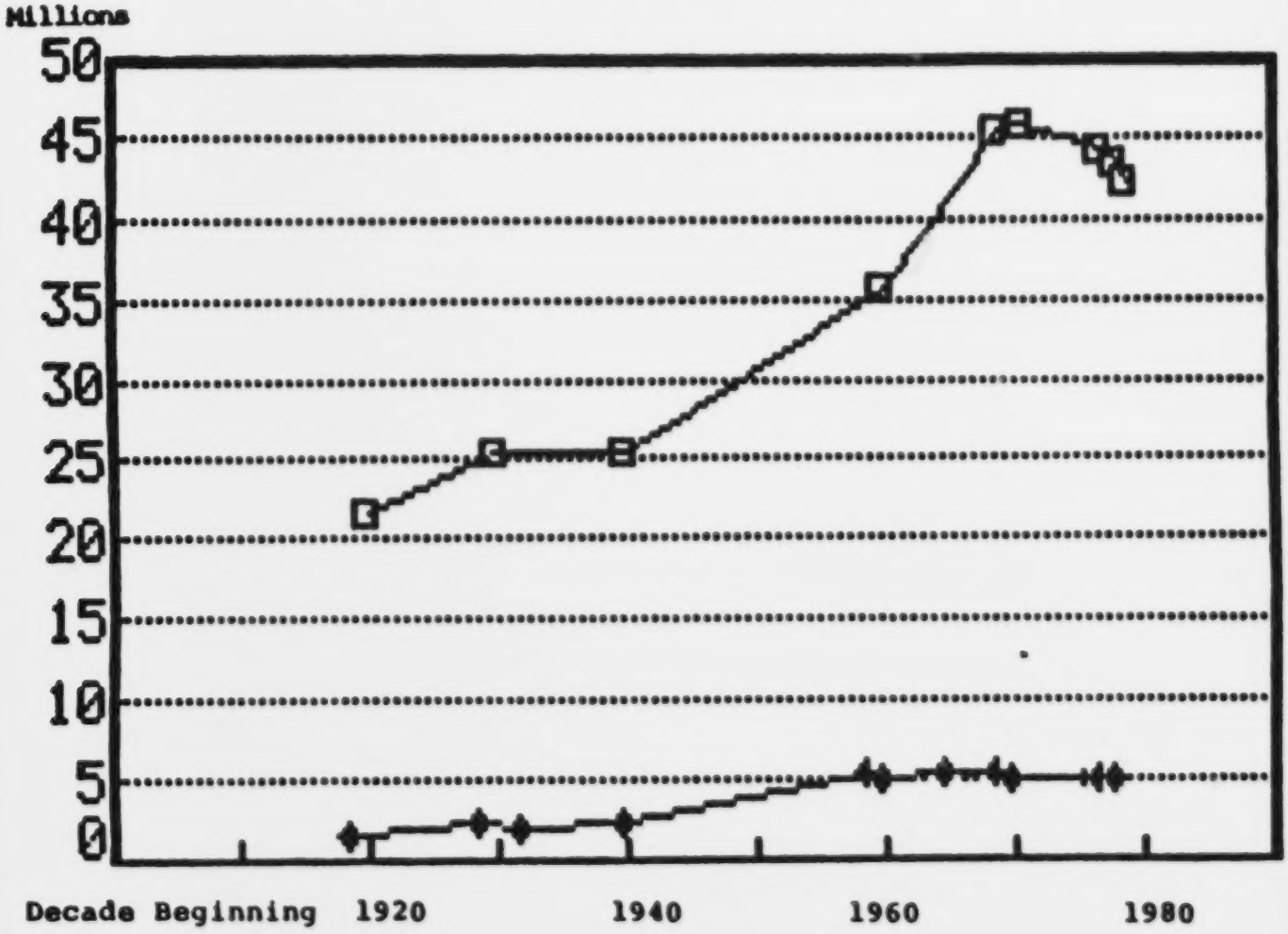
SHIFTS WITHIN THE PRIVATE SCHOOL POPULATION

As noted above, secularization of the public school program and major shifts within the private school population are taking place simultaneously. To be sure, the total private school population remains relatively small and constant compared to the public school population (Figure 1). However, dramatic internal changes have taken place. Figure 2 shows private school enrollments broken down between Catholic and non-Catholic populations. While the Catholic school population has declined,[90] the non-Catholic private school population has more than doubled from 1965 to 1975 [91] and may have tripled or quadrupled.[92]

This increase reflects, at least in part, the growth of the new Christian schools. Included with the new schools are some older schools -- Lutheran, Jewish, Seventh Day Adventist and others,[93] and some of the new schools are Montessori schools and communal schools.[94] Home instruction may also be on the rise.[95] But the rate of growth seems to be largely due to the Christian school movement.[96]

FIGURE 1

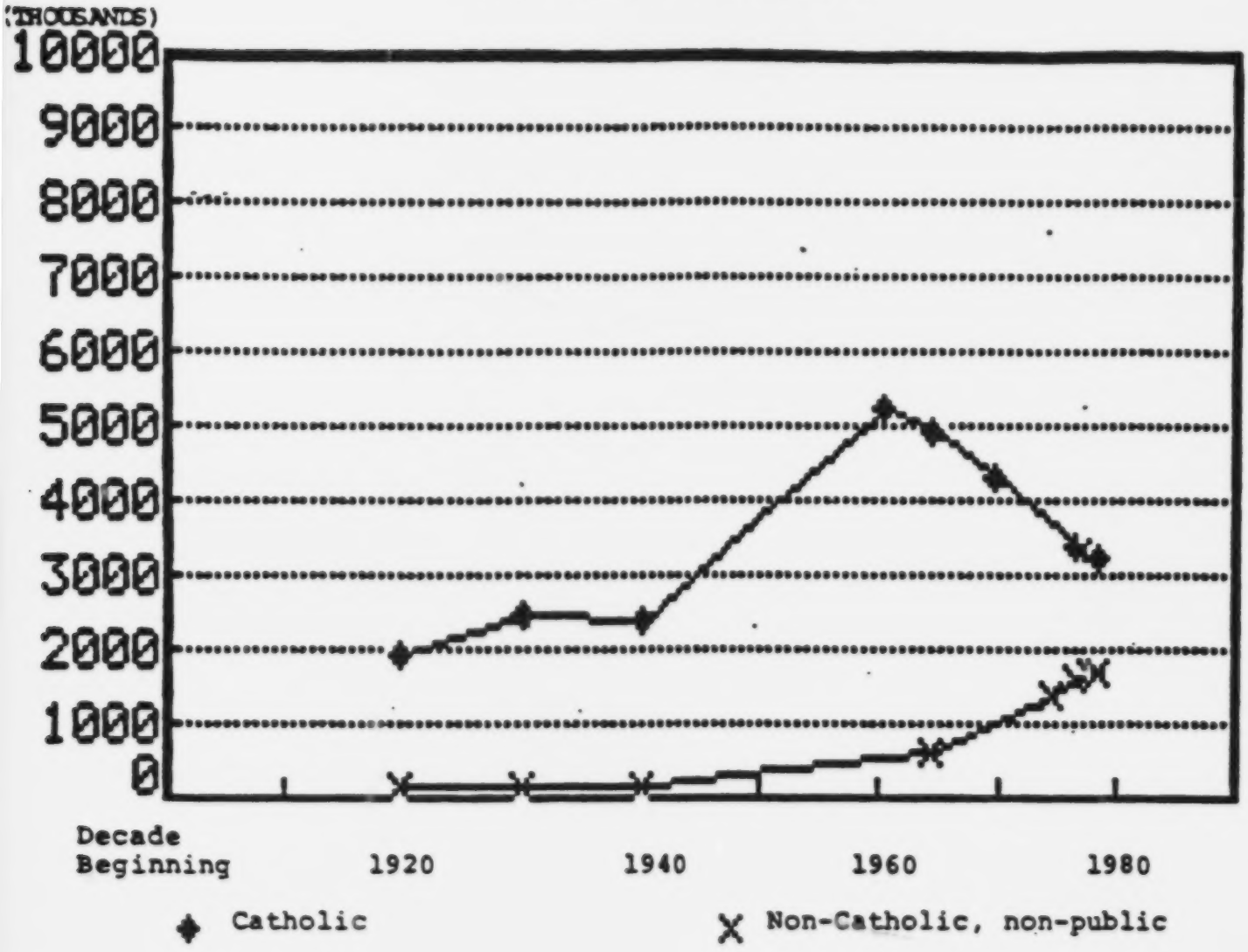
PUBLIC AND PRIVATE SCHOOL ENROLLMENTS



Source: See Appendix A.

FIGURE 2

PRIVATE SCHOOL ENROLLMENTS



Source: See Appendix A.

TRENDS IN LITIGATION

The new schools have encountered hostility in many quarters, much as Catholic schools did up through the 1920s. To be sure, some new schools offer cause for concern. They may have inadequate physical facilities, poorly qualified teachers, or too few teachers. A few schools may be teaching political views that diverge sharply from the mainstream of American democratic thought. But many are simply new.

In any case, public officials who view these schools as inadequate have been using compulsory education laws and other legal tools to require them to meet state standards or to shut down. Litigation over state regulation of private education has increased sharply in the past several years. More amicable forms of conflict resolution have broken down.

Tension between public officials and new private schools sometimes runs quite high. In Nebraska, for example, in a much publicized case, a local judge ordered a church door padlocked except during hours of worship, to enforce a court order closing the school operated on church premises. The churchmen responded with sit-ins and other forms of passive resistance. Many were arrested. Other state officials and other churchmen continued to negotiate, but the impasse was not broken until the governor and legislature acted.

Earlier, in North Carolina, a Christian school that lost a court battle responded by successfully seeking legislation lowering standards for those private schools that did not desire state approval. The bitterness of the battle with state administrators left its mark, however, as the Christian school lobby also managed to persuade the legislature to place the responsible officer in the governor's office rather than the state department of education.

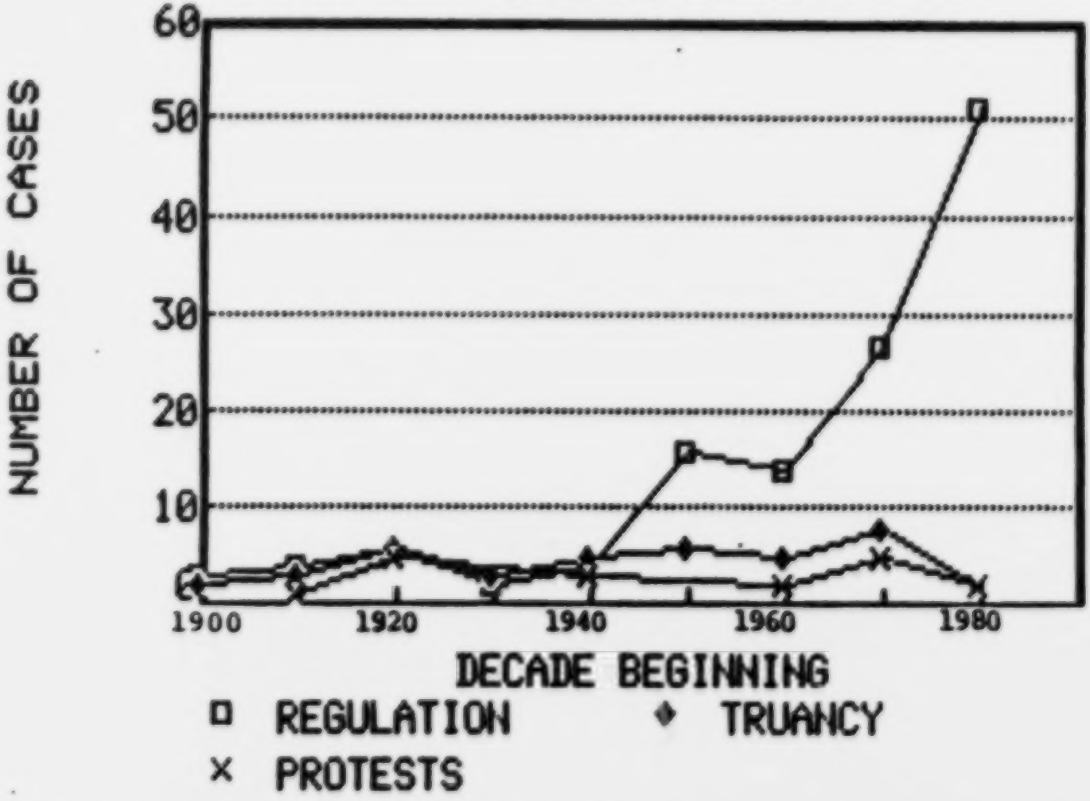
A quantitative measure of this tension might be the frequency of litigation. Typically, people do not invoke judicial intervention except when they are unable to resolve differences through discussion, negotiation or political processes. The legal process is expensive, time-consuming and emotionally painful. The positions of the parties harden and become inflexible. Frequently, even clear winners are emotionally exhausted. In short, an increase in litigation over an issue of public policy indicates not only that policy changes are in the wind but also that the changes have not won a social consensus.

Figure 3 shows actual reported cases involving regulation of private education and related truancy cases. Both kinds of cases were infrequent before the 1950s. But the numbers of regulation cases sharply increased in the 1970s and again in the 1980s. If the exponential increases of the early 1980s continue throughout the decade, four to five times more cases will be brought in the

1980s than in the 1970s. (Figure 4 estimates cases for the first three years of the 1980s and the number of cases for the 1980s, based on a straightforward projection.)

FIGURE 3

LITIGATION UNDER COMPULSORY EDUCATION LAWS
AND OTHER LAWS REGULATING PRIVATE SCHOOLS



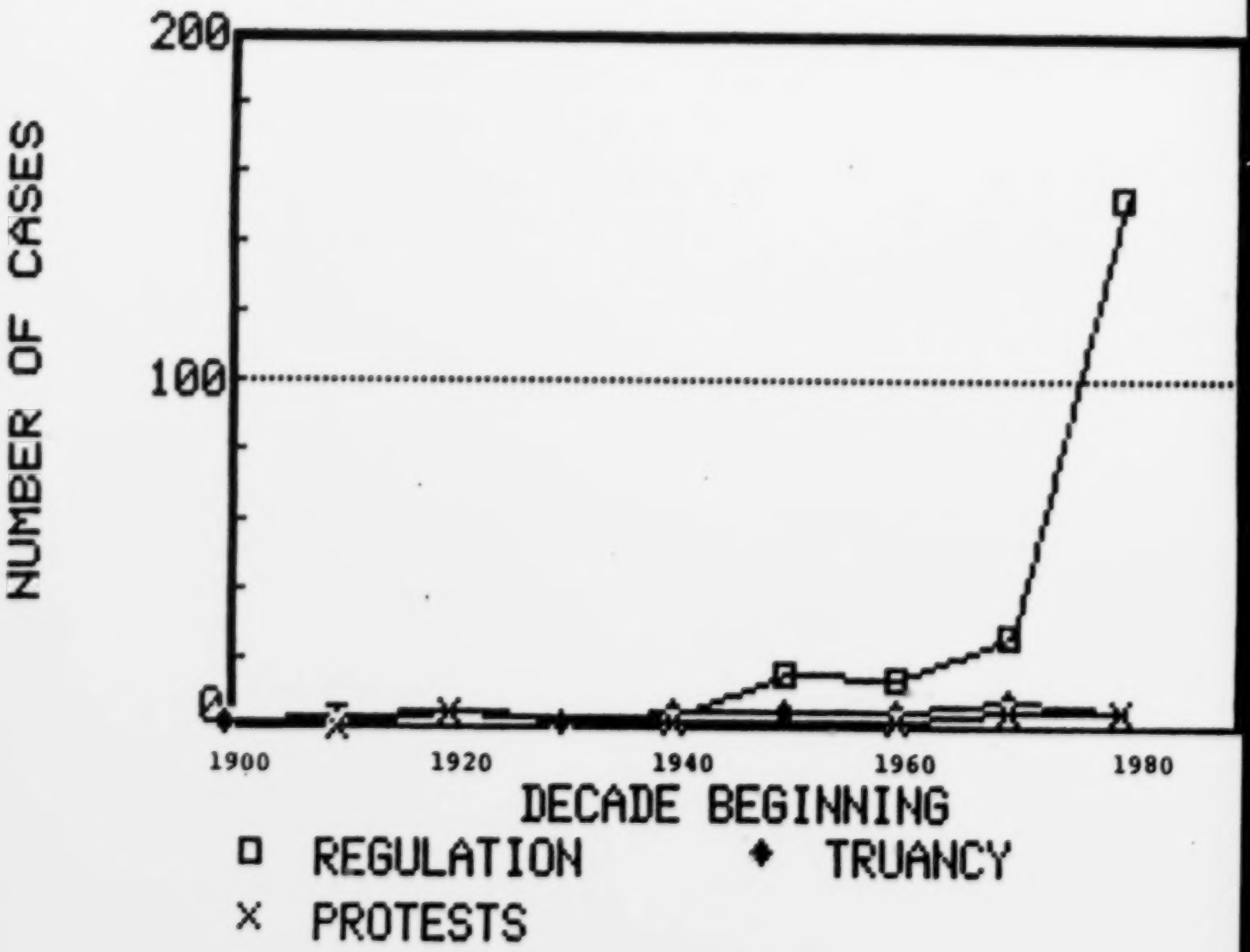
Regulation cases are those involving adequacy or appropriateness of private education choices. Truancy cases are those in which parents failed to enroll a child in any education program; "protests" are truancy cases in which parents withdrew a child from a public school because of a religious or philosophical disagreement, and failed by the time of prosecution to enroll the child in a private program. Cases for the 1980's are actual and not projected.

For Source of Data see Appendix B.

Appendix B consists of Briefs of all reported cases dealing with compulsory education and other forms of regulation of private education. It is unpublished, but will be made available through ERIC.

FIGURE 4

LITIGATION UNDER COMPULSORY EDUCATION LAWS AND OTHER LAWS REGULATING PRIVATE SCHOOLS



For explanation, see Figure 3. Cases for the 1980s are estimated, based on frequency for 1980--1983.
(More cases for 1983 are expected, as cases are published.)

One explanation for the increase could be a general increase in population coupled with a deterioration in other dispute resolution processes. However, this cannot account for the extraordinarily sharp increase in regulation cases while other types of cases increased only slightly. It seems more likely that a combination of events triggered the change. Most obvious is the belief of many leaders of fundamentalist Christian schools that the school is an extension of the church and therefore not subject to state regulation. Many pastors and congregations view compromise as a religious defeat, rather than a political stratagem. Many state officials meet this stubbornness with equal stubbornness. One might also speculate that the data reflect a change in the application of laws written in most cases over a century ago to deal with children who avoided education altogether. The data may also reflect a general increase in state board regulation, pursuant to general compulsory education laws, and the growing ability of state boards to enforce regulations.[97] There has been a trend towards setting standards for schools, rather than merely requiring attendance.[98]

Judicial resolution of the conflict is likely to be slow in coming. Litigation has not, to date, yielded any unified legal theory and courts uphold state standards as often as they strike them down.[99] Generally, though, courts will balance the state's interest in regulation (which must be designed to assure that children are self-sufficient and capable citizens), with first amendment freedoms for individuals.[100]

Clearly, some minimal standards will pass constitutional muster.[101] Requiring reports on enrollment, for example, is generally upheld by the courts. Teacher certification requirements, on the other hand, have been upheld in some states[102] and stricken in others.[103] Of course, a decisive case or series of cases from the Supreme Court could settle much of the matter, as it did in the Pierce case and related cases in the 1920s. Courts typically rule narrowly, however, and the range of issues presented in various states is unlikely ever to be fully addressed by the U.S. Supreme Court.

TRENDS IN LEGISLATION

In the final analysis, it is for legislatures to decide how much they wish to accommodate dissenting groups, and at what cost to uniformity in education standards.

In fact, state legislatures have been more responsive to the recent problems of private schools than have the courts. The critical issues have been handled by designing more specific and narrow methods of protecting children from abuse and neglect, and by protecting parents from unscrupulous schools that make false claims about their attributes.

- South Dakota, recently exempted children from the compulsory education law if they receive "competent alternative instruction for an equivalent period of time, as in the public schools."[104]

- Georgia adopted a new law last year to relieve pressure on private schools.[105]

- North Carolina and Alabama have established two levels of state approval. One implies a state review of school standards; the other is approval only for purposes of compulsory attendance laws.[106]

- Vermont's new law has made it clear that the state board has no authority to expand upon statutory standards.[107]

- Colorado, last year, adopted a law specifying that its state board of education has no jurisdiction over the "internal affairs of any nonstate or parochial school" although these schools must meet some attendance and basic education requirements.[108]

- Arizona has made it clear that home instruction is permissible (aiding Christian fundamentalists interested in correspondence courses) as long as teachers and children are periodically tested.[109]

- Mississippi has adopted a law prohibiting regulation of private schools.[110]

- Louisiana has repealed all state requirements for teachers in private schools.[111]

- New Hampshire has not altered its statute but has administratively determined to accept outlines of essential information on church stationery in lieu of reports on state forms.

- In Nebraska, where polarization has been great, Governor Robert Kerrey appointed a four-member panel to recommend new policy.

The panel presented a strong set of recommendations that included deregulation of Christian schools and annual testing of students as a means of assuring accountability.[112] The legislature subsequently adopted a law that authorizes "instruction monitors" in private schools, provided that they either submit credentials for review or take a nationally standardized test. Poor credentials or test scores do not necessarily lead to state disapproval of the school, however.[113]

There appears to be no countervailing trend away from accommodation and towards stricter legislative standards. In states that do not regulate private schools at all, there is some interest in requiring reporting of data, but bills that would require reporting have not passed. The only exception, perhaps, comes with the unintended consequences of recent efforts to improve education nationwide by increasing the length of the school day or the school year under compulsory education laws: such laws increase expenses for all schools.

SOURCES OF TENSION

That private schools compete with public schools is a recurring theme. Some private educators have viewed public education as subversive, substandard or otherwise undesirable. Public educators who fear private schools seem to feel that they are either too good or not good enough. What is the source of this conflict? Do private schools and public schools compete, and, if so, what are the stakes?

Do public and private schools compete financially? Given present policies on public assistance to private education, private schools and home instruction do not offer substantial competition for public dollars. They even relieve financial pressure on the public schools, at least on a large scale. Yet as long as there is pressure to change these policies, private schools remain potential competitors. Further, in small school districts, a sudden exodus of 40 children to a new school can have a substantial impact on state aid. All in all, however, financial competition is only a possibility or is limited to narrow geographic areas.

Do nonpublic schools compete with public schools in educational excellence? Many do, especially those that strongly emphasize academic standards. But the newest private schools are the one most likely to meet public opposition, and also most

likely to be substandard in terms of physical components. For example, Catholic schools were severely underfunded in the nineteenth century. Even in recent times, they have suffered from inferior facilities and faculty; they have never rivaled public schools in such things as expenditures per pupil, science facilities, or counseling.[114]

Many of today's new private schools have similar problems, which the current move for greater excellence in public programs may exacerbate.[115] If stiffer standards are set for public schools and extended to private schools -- if, for example, a longer school day or school year is prescribed in the compulsory education law that applies equally to public and private schools -- the cost may be prohibitive for private schools. Of course, the public school improvements will also make the public school more competitive. Based on measurement of things money can buy, private schools do not offer any real threat to government schools. Public schools are relatively well endowed and they charge no tuition.

On the other hand, if one examines results rather than facilities, private schools seem equal to - some would argue better than - public schools. The Coleman report claims, based on test scores, that private schools, on the average, do a better job.[116] Based on historical evidence, one can say, at minimum, that they have served their populations well. In particular, students in Catholic schools, representing over 90% of the private

school population until the 1960s, have succeeded against poverty and prejudice. An immigrant population built an education system that today provides an alternative for roughly five million children. And these children fare well. Adult Catholics who attended Catholic schools are somewhat better off educationally and economically, and have fewer racist sentiments, than Catholics who attended other schools.[117] In income and education, Catholics have moved ahead of Lutherans and Baptists, although they still lag behind Jews, Episcopalians and Presbyterians.[118] Andrew Greeley points out that adult Irish Catholics under 40 have graduated from college at a rate second only to Jews and enjoy an income level second to none.[119] In this new generation, Italian Catholics are second only to Irish Catholics in income.

As there is only the most selective and limited evidence about how children are faring in the new Christian schools, no similar conclusions can be made for them, but the evidence that does exist tends to be favorable.[120] Nonetheless, the charge is often made that they are not good enough, but the measures of excellence are based on public measures of resources -- number of certified teachers and other aspects of faculty and facilities. Anti-science sentiments in some new schools may leave children poorly equipped for high-paying jobs in science and technology. A fundamentalist Christian might argue that material gain is not the goal; a crusading public educator might then argue that the result is unjust to the child, who must be saved from the unsound decision of the parent. The clash gains further momentum from the

political differences typical of the two camps. The fundamentalists tend to be right of center, while public educators are in the center or left of center. Thus, public and private schools do compete -- over what each believes to be best for the child. It is a struggle to shape future generations.

The fact that the most dramatic changes in private school population have occurred during changes in public school values also suggests that the most serious competition is over values. Both in the 19th Century and now it appears that a substantial number of individuals choose private schools because of religious beliefs. Then, as now, the values reflected in the public schools influenced this choice.

Giving priority to values rather than physical facilities is particularly common among the new Protestant fundamentalist schools. Typically, these schools are located in church basements. They cannot afford much in the way of salary for the teachers. They often refuse to obtain state accreditation. Teachers refuse to obtain teaching certificates, even when they are certifiable[121] and even when it is required by law. This has not deterred the families who chose these schools, because they have an overriding concern for values in education.[122]

Most educators who take a strong position against the new schools say they base this position on standards, not values. But a public ideal expressed by Horace Mann seems also to have its

influence:

> . . . the tendency of the private school system is to assimilate our modes of education to those of England, where churchmen and dissenters, -- each sect according to its own creed, -- maintain separate schools, in which children are taught, from their tenderest years to wield the sword of polemics with fatal dexterity; and where the gospel, instead of being a temple of peace, is converted into an armory of deadly weapons, for social, interminable warfare. Of such disastrous consequences, there is but one remedy and one preventive. It is the elevation of the common schools.[123]

, p. 43

CONCLUSION

Public schools at the beginning of the 20th Century reflected evangelical, Protestant values; today they reflect mostly secular values. This change has made the public schools less acceptable to those evangelical Protestants who believe that education must reflect religious values. It may also have affected the decision of Catholics and others to attend public schools, although the reasons for the decline in the Catholic school population appear to be quite varied.

The sharp rise in litigation over state regulation in private schools in the 1980s is evidence of new tension between public and private education. At this point, public educators who are seeking to regulate the new private schools do so based on their belief in minimum standards. A large number of private schools, especially the new Protestant schools, is resisting regulation for religious reasons. For the sake of both the public and private schools, the impasse needs to be resolved.

As a practical matter, the existence of private schools takes pressure off public schools to try to be all things for all people -- to try to foster religious sentiment, for example. While no trend is discernible in the courts, the trend in state legislatures is now toward accommodation. It appears that public schools and the new private schools will ultimately make peace,

much as the public schools and the early Catholic schools did.

The American constitutional tradition protects minorities, and those who choose private education are very often an ideological or religious minority. Certainly those currently facing legal problems over this choice are dissenters from the majority vision for education today. Most of the dissenters are Christians -- a majority religion -- but they are Christians who believe they must bear witness to their faith every day, including the time spent at work or school. As legislators and judges recognize the emergence of this new minority -- these witnessing Christians -- they will make room for them in the American scene.

NOTES

*Pat Lines is the director of the Law and Education Center, at the Education Commission of the States. This paper was supported, in part, by a contract with the U.S. Department of Education. The ECS Law and Education Center is supported by state fees, and by grants from the Spencer Foundation, the Carnegie Corporation of New York and the Ford Foundation. Views are those of the author, and do not necessarily reflect the views of these organizations.

The author wishes to express graditute to those who commented on earlier drafts of this paper, or in other ways helped develop the material. Chuck O'Malley, of the United States Department of Education, encouraged and funded the project and provided a list of about 300 persons interested in private education. I wrote these people, telling them of our contract with the Department of Education, and asking them if they would be interested in commenting on work in process.

Many said yes, and in the end those that commented or provided help or encouragement included, in addition to Chuck O'Malley and Ken Terrill, also of the Department of Education, Lawrence Cremin, "Skeeter" Ellis, John Esty, the Rev. Thomas G. Gallagher, Leslie Gerstman, Charlie Glenn, Nelson Harper, Gene Ladendorf, Jim Lowden, Bruno Manno, Stephen O'Brian, Cary Potter, Steve Prager, Ned Rhinelander, Al Tieken, Ed Ulrick and Ralph O. West. Those who commented included leaders in the older Catholic, Lutheran, Jewish and independent education communities, as well as a number from the newer Christian school movement. Also included were those who take a keen interest in the historical and social context of the conflict between the public and private sectors in education. The author thanks them all, and hopes they will be tolerant of the occasions where she did not heed their advice.

1. The author has undertaken such an effort elsewhere, and has concluded that legislatures, not courts, provide a better route for resolution of the current antagonism between public educators and new private schools. Patricia Lines, Private Education Alternatives and State Regulation, 12 J. of Law and Ed. 189-234 (April 1983).

2. See letter to German Rulers, 1524. Luther urges that "the civil authorities are under obligation to compel the people to send their children to school . . . because in this case we are warring with the devil . . . ." The context of the tract is discussed by Gustav Marius Bruce, Luther as an Educator, Minneapolis: Augsburg Publishing House, 1928, at 155-64. See also Letter to Elector John of Saxony, 1529, in Preserved Smith and Charles M. Jacobs, Luther's Correspondence and Other Contemporary Letters, Philadelphia: The Lutheran Publications Society, at 384-85.

3. Murray N. Rothbard, "Historical Origins," in William F. Rickenbacker, ed., The Twelve-Year Sentence, LaSalle, Ill.: Open Court Pub. Co., 1974, at 12.

4. Id. at 13.

5. See Michael Katz, Class Bureaucracy and School: The Illusion of Educational Change in America, N.Y.: Praeger Pub. (2d ed. 1975), at 22

6. Bernard Bailyn, Education in the Forming of American Society, New York: W.W. Norton & Co., 1960 (paperback ed. 1972), at 11. See also Michael B. Katz, supra note 5 at 23.

7. E.g. Statute of Artificers, 1563 5 Eliz. I, c. iv.

8. Bailyn, supra note 6, at 18.

9. Id. at 39.

10. Id. at 40.

11. Bailyn cites a stream of laws in the mid-17th Century "ordering all towns to maintain teaching institutions, fining recalcitrants, stating and restating the urgencies of the situation" as evidence of "fear of the imminent loss of cultural standards, of the possibility that civilization itself would be 'buried in the grave of our fathers'." Bailyn, supra note 6, at 27.

12. Records of the Governor and Company of Massachusetts Bay in New England, 1642 (June 14), at 6-9. The law also required knowledge of a trade. See Marcus W. Jernegan, Compulsory Education in the American Colonies, The School Review, 26: 731 (1981), at 735-36, for a copy of the law.

13. Id. at 7.

14. Id. at 6.

15. Book of the General Laws and Libertyes Concerning the Inhabitants of the Massachusetts, Collected Out of the Records of the General Court for the Several Years Wherein They Were Made and Established, Cambridge, Mass., 1648. See Jernegan, supra note 12, at 740-41, for a published copy of the law.

16. Charters and General Laws of the Colony and Province of Massachusetts Bay (1644), ch. 88, sec. 1.

17. Public Records of the Colony of Connecticut to 1655 (Trumbull, ed.), at 520--521; Records of the Colony and

Jurisdiction of New Haven, 1653--1665 (1858), at 583--584; The Book of the General Laws of the Inhabitants of New Plimouth (1685), ch. V, sec. 1, at 13.

18. The Book of General Laws of the Inhabitants of New Plimouth (1685), ch. V. sec. 1, at 13.

19. Jernegan, supra, note 12, at 749.

20. See Jernegan, supra note 12, at 744.

21. See, e.g., Laws of the Province of Pennsylvania, 1683, c. CXII.

22. Laws of Virginia, 1642--43, Act 43; and 1646, Act 27.

23. R. Butts and Lawrence A. Cremin, A History of Education in American Culture, N.Y.: Henry Holt & Co., 1953, at 105.

24. Marcus W. Jernegan, Laboring and Dependent Classes in Colonial America, 1607-1783, Chicago: Univ. of Chi. Press, 1931, at 115. See also Newton Edward and Herman G. Richev, The School in the American Social Order, Boston: Houghton-Mifflin Co., 1947, at 59. See also Public Records, Colony of Connecticut, 1678--89, at 251, 427--28. Act of 1691, (Mass.) Acts and Resolves, vol. 1, at 27, 99. Public Records, Colony of Connecticut, 1678--89, at 427--28. ?? Privy Council Acts of 1695 (Aug. 22); See Laws of New Hampshire, vol. III, 2d Sess. 1766, c. 14, at 14.

25. Marcus W. Jernegan, supra note 24, at 115; Edwards and Richey, supra note 24, at 108-109.

26. Ellwood P. Cubberly, The History of Education, Boston: Houghton Mifflin, 1920, at 653-55.

27. Acts and Resolves of Massachusetts, 1789, ch. 19.

28. [Mass.] st. 1852, c. 240, secs. 1, 2, & 4. See also Rothbard, supra note 9, at 14.

29. Marcus W. Jernegan, "Compulsory Education in the American Colonies II," The School Review, vol. 27, No. 1, Jan. 1919, at 39.

30. Lawrence Kotin and William F. Aikman, Legal Foundations of Compulsory School Attendance, Port Washington, N.Y.: Kennikat Press, 1980, at 25--26; Nelda Umbech, "State Legislation on School Attendance and Related Matters," U.S. Office of Education Circular no. 615, 1960.

31. Katz, supra note 2, at 37.

32. See Lawrence A. Cremin, American Education: The National Experience 1783--1876. New York: Harper & Row, N.Y., 1980, pp. 50--105; David Tyack and Elisabeth Hansot, Managers of Virtue: Public School Leadership in America, 1820-1980, Basic Books, N.Y.,1982; John Westerhoff, McGuffey and His Readers, Abingdon, Nashville, 1978; Newton Edwards, "The Evolution of American Educational Ideals," in Edwards, ed., Education in a Democracy, Chi.: Univ. of Chi. Press, 1941, at 2--4.

33. John H. Westerhoff III, McGuffey and His Readers, Nashville: Parthenon, 1978, at 14.

34. Neil G. McCluskey, "The New Secularity and the Requirements of Pluralism," in Theodore R. Sizer, ed., Religion and Public Education, Boston: Houghton Miffen Co., 1967, at 234-35.

35. For example, the New York Public School Society was formed in 1805 to promote free schools for the very poor -- those not provided for by any religious society. The early free schools of Pennsylvania were only for the poor, and not until 1830 did the legislature decide to open them up to all children. Katz, supra note 5, at 14. In 1837 and 1838 the idea of universal public education was introduced at the Pennsylvania state constitutional convention, and lost. Id.

36. David Hackett Fischer, "The Myth of the Essex Junto," William & Mary Quarterly (April 1964), at 191--235. See also Rothbard, supra note 9, at 15.

37. Katz, supra note 5, at 40.

38. Id. at 37, 40.

39. Rothbard, supra note 3, at 17.

40. McCluskey, supra note 34, at 233.

41. See e.g., Nathan H. Winter, Jewish Education in a Pluralist Society, New York: New York University Press, 1966.

42. James Michael Lee, "Catholic Education in the United States," in Lee, ed., Catholic Education in the Western World, Notre Dame: Univ. of Notre Dame Press, 1967, at 225.

43. See Figure 2 in the text.

44. Jay P. Dolan, The Immigrant Church, Baltimore: Johns Hopkins Press, 1975, at 1-2.

45. Dolan, supra note 44, at 1--4.

46. Dolan, supra note 44, at 2.

47. Dolan, supra note 44, at 3.

48. In mid-century New York, in one Irish ward, one of five adults died in a period of 32 months; in another, 1 in 17 persons died in a year (1854). Dolan, supra note 41, at 39.

49. In May, a Protestant society favoring King James version of the Bible, held a meeting in Kensington, an Irish working-class area, to protest a school board decision to allow Catholic children to use the Douay version; shots rang out; at least one Protestant was killed. In the end, several blocks of the district were burned. Bernard A. Weisberger, The American Heritage History of the American People, New York: American Heritage Publishing Co., Inc. 1970, at 172.

50. Dolan, supra note 44, at 104.

51. Dolan, supra note 44, at 102.

52. Dolan, supra note 44, at 104.

53. Lee, supra note 42, at 255-56.

54. Lee, supra note 42, at 255-56.

55. See Meyer v. Nebraska, 262 U.S. 390 (1923); Farrington v. Tokuskiga, 273 U.S. 284 (1927).

56. 268 U.S. 510 (1925).

57. Padover, ed., The Complete Jefferson 1064-69 (1943).

58. See Joseph F. Costanzo, Thomas Jefferson, Religious Education and Public Law, 8 J. of Pub. L. 81 (1961); R. Freeman Butts, "Say Nothing of my Religion," School and Society, vol. 81, at 182 (1955). For the view that Jefferson opposed support of any religion, see Thurston N. Davis, Footnote on Church-State, School and Society, vol. 81, at 180 (1955). The phrase "common to all sects" is from the report in an 1818 document on the curriculum of the University of Virginia, in which Jefferson abandons the idea of a department of theology and urges that religion is within the province of a professor of ethics. Padover, supra at 1104; Costanzo, supra at 101-02.

59. See Lawrence A. Cremin, Horace Mann, the Republic and the School, New York: Teachers College, 1957, at 3.

60. In 1840, Mann, writing of his battle to preserve the Board of Education, told his friend Henry Barnard, "I know it is the greatest of earthly causes. It is a part of my religion that it must prevail." See the discussion in Katz, supra note 2,

at 44. In 1846, in response to a widespread public debate triggered by the will of Stephen Girard of Pennsylvania, establishing a school for orphans on condition that no religious personnel teach there, Mann said, "The whole influence of the Board of Education from the day of its organization to the present time, has been to promote and encourage, and, whenever they have had any power, as in the case of the Normal Schools, to direct the daily use of the Bible in school." Taken from Lawrence Cremin, The American Common School, An Historic Conception, N.Y.: Teachers College, Columbia Univ. 1951, at 47, 198.

For two sermons revealing Mann's religious perspective, see Jay Elmer Morgan, ed., Horace Mann at Antioch, Washington, D.C.: NEA, 1938, at 393, 411. See also his address, Oct. 5, 1853, at the inauguration of the college, id. at 189.

61. Charles Glenn, "Can We Stop Fighting Over Religion and Public Education," manuscript based on talk at the Second Annual Berkshire Prayer Breakfast, Pittsfield, Massachusetts, Feb. 2, 1984. Glenn argues that Mann was actually imposing a Unitarian point of view on the formerly evangelical Protestant schools. Cremin, who has provided considerable detail on the rift among Protestants, especially Congregationalists, feels that at bottom Mann's views were not too different from the "evangelical conceptions of the day." Cremin, supra note 57, at 140.

62. Cremin, supra note 53, at 13.

63. Horace Bushnell, Common Schools: A Discourse on the Modifications Demanded by the Roman Catholics (Hartford, Conn: Case, Tiffany & Co., 1853).

64. Taken from Lawrence Cremin, The American Common School, An Historic Conception, N.Y.: Teachers College, Columbia Univ., 1951, at 47.

65. Westerhoff, supra note 33, at 19.

66. John Dewey, The School and Society, Chicago: The University of Chicago Press, 21st Impression, 1965.

67. Cremin, The Transformation of the School, New York: Alfred A. Knopf, Inc., 1961, at 90.

68. Cardinal Principles of Secondary Education, U.S. Bureau of Education, Bulletin, 1918, no. 35, Washington D.C.

69. Cremin, supra note 67, at 240.

70. Id. at 242--45.

71. Commonwealth v. Renfrew, 332 Mass. 492, 126 NE.2d 109 (1955).

72. The prayer is quoted in Engel v. Vitale, 370 U.S. 421 (1962).

73. See Gitlow v State of New York, 168 U.S. 652 (1925).

74. Engel v. Vitale, 370 U.S. 421 (1962).

75. School District of Abington Township v. Schemp, 374 U.S. 203 (1963).

76. See Kenneth M. Dolbeare and Phillip E. Hammond, The School Prayer Decisions, Chicago: The University of Chicago Press, 1971.

77. 348 F.2d 999 (2d Cir. 1965). For a discussion of the response to this and similar cases, see generally, John H. Laubach, School Progress, Congress, the Court and the Public, Washington, D.C.: Public Affairs Press, 1969.

78. Stone v. Graham, 101 S. Ct. 192 (1980).

79. Treen v. Karen B., 102 U.S. 1267 (1982), aff'ing per curiam 653 F.2d 897 (5th Cir. 1981).

80. Widmar v. Vincent, 454 U.S. 263 (1981) (prohibiting university officials from refusing space to students who planned a religious meeting).

81. See Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983).

One of the laws ultimately found unconstitutional in all of this litigation had been championed by former Governor Fob James, who at one point risked contempt of court charges for urging Alabama citizens to ignore court orders prohibiting prayer in the schools. The invalid law would have allowed teachers, including college professors, to "lead willing students in prayer," and it suggested a prayer written by the governor's son, then a law student:

> Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of our Lord. Amen.
>
> Ala. Act 82-735 (1982) (emphasis in the original).

82. For example, the Cedar Rapids, Iowa, school district adopted written guidelines for the study of religious history and traditions in the public school program. The guidelines use Supreme Court language for determining valid teaching activity and specify that "(1) the activity must have a secular purpose; (2) the activity's principal or primary effect must be one that neither advances nor inhibits religion; and (3) the activity must not foster an excessive governmental entanglement with religion." the district permits the schools to observe religious holidays, include materials in the school program that bear on "historical and contemporary significance" of religious holidays. The instruction must be unbiased and objective, and selection of holidays must "take into account major celebrations of several world religions, not just those of a single religion." Such programs must be "educationally sound and sensitive to religious differences . . . ." The policy resembles that upheld by the U.S. Court of Appeals for the Eighth Circuit in Florey v. Sioux Falls School Dist., 619 F.2d 1311 (8th Cir.), cert. denied, 101 S. Ct. 409 (1980).

83. When the New Jersey Civil Liberties Union filed a law suit against a state law calling for a moment of silence, state officials, including the Governor and Attorney General, refused to defend it. A federal district court judge ultimately struck the law down. May v. Cooperman, 572 F. Supp. 1561 (D.N.J. 1983). It is the only case in which a moment of silence, established in a law that does not by its terms mention prayer, has been struck down. Among other things, the court found an unconstitutional intent based upon statements of key sponsors of the bill. The decision raises the strange possibility of an identical law being upheld in sister states, because of a different legislative record.

84. E.g. Widmar v. Vincent, 454 U.S. 263 (1981). See also Bender v. Williamsport Area School Dist., 563 F. Supp. 697 (M.D. Pa. 1983); Lubbock Civil Liberties Union v. Lubbock Ind. School Dist., 669 F.2d 1038 (5th Cir. 1982); Collins v. Chandler Unified School Dist., 644 F.2d 759 (9th Cir. 1981), cert. denied, 454 U.S. 863 (1981); Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981).

85. Even before the current Christian school phenomena, Otto Kraushaar had observed that: "Even the nondenominational independent schools generally owe their origins to founders who evinced a strong desire to transmit nonsectarian but nonetheless distinctly Protestant, middle class moral and religious ideals, but with strong emphasis also on superior academic attainments." Otto F. Kraushaar, American Nonpublic Schools -- Patterns of Diversity, Baltimore: John Hopkins,

1972, at 6.

86. One major reason, some suggest, is increased income of Catholic families. R. L. Nault, D.A. Erickson and B.S. Cooper, "Hard Times fo: Nonpublic Schools," The National Elementary Principal 56 (July-August), pp. 16-21. As Catholics become more affluent, they move to the suburbs, and choose other kinds of schools. In another study, the decline is attributed to complex factors:

> It may be clear, years from now, that the serious Catholic school enrollment setbacks during the ten years under study are best explained by . . . a stunning combination of profound challenges, each of which reinforces the negative impact of all the others. To mention just a few: it was a massive fiscal shock, for a system subsidized enormously for decades by the contributed services of nuns, priests, and brothers, to have the supply of these religious teachers diminished drastically, to have the costs of the remaining religious teachers increase three-to-four fold, and to replace most of them with "lay" teachers whose salaries were astronomical by comparison. No other nonpublic school group faced the massive city-to-suburb migration that Catholics have recently undergone, coupled with the refusal of church leaders to replace old city schools with new suburban ones. (One can hardly attend a non-existent school!) But perhaps most fundamentally, no other nonpublic school group underwent the startling, rapid shifts in philosophical outlook that the Second Vatican Council symbolized. The doctrine that provided the old reasons for Catholic schools were largely swept away or reinterpreted.
>
> Donald A. Erickson, Richard Nault, Bruce S. Cooper, and Robert Lamborn, "Recent Enrollment Trends in U.S. Nonpublic Schools," Report to the National Institute of Education, August 1976.
>
> See also, Bruce S. Cooper, Donald H. McLaughlin, and Bruno V. Manno, "The Latest Word on Private School Growth," Teachers College Record, 85:1, Fall, 1983, at 88-98.

87. Report of the Governor's Christian School Issue Panel, January 26, 1984, at 1.

88. See "Does David Gibbs Practice Law as Well as He Preaches Church-State Separation?," Christianty Today, Oct. 10, 1981, at 48-51.

89. Cases where this kind a argument was offered into evidence include State v. Faith Baptist Church, 107 Neb. 802, 301

N.W.2d 571 (1981), appeal dismissed for want of a substantial federal question, 102 S.Ct. 75 (1981); State v. Shaver, 294 N.W.2d 883 (N.D. 1980); State v. Kasuboski, 87 Wis. 2d 407, 275 N.W.2d 101 (Wis. App. 1978); Hill v. State, 381 So. 2d 91 (Ala. Crim, App. 1979), reversed on other grounds, 381 So. 2d 94 (Ala. 1980); Hill v. State, 410 So. 2d 431 (Ala. Crim, app. 1981) (same parties; convictions upheld after procedural defects corrected); Iowa v. Moorhead, 308 N.W.2d 60 (Iowa 1981); State v. Riddle, 285 S.E.2d 359 (W. Va. 1981).

90. See Figures 1 and 2, below; and authorities cited at note 86, supra.

91. See Figures 2, below. The Bureau of the Census estimates that enrollment in non-Catholic, nonpublic schools increased from 615,548 to 1,433,000 between 1965 and 1975, but these are probably only the more formal and accredited schools.

92. It seems likely that the largest growth is in attendance at unapproved schools. These small unaccredited schools often do not seek and do not want state approval, and probably do not want to be counted by the Census Bureau. Many of these unauthorized schools are fundamentalist Christian schools, which as a matter of faith reject state authority over their operations and refuse even to provide information on themselves. See Cooper, McLaughlin and Manno, supra note 86.

In contrast the public school population has declined from approximately 45,900,000 in 1970, to 42,600,000 in 1978, to 41,204,093 in fall 1980; and to 40,984,093 by fall of 1981. DHEW, National Center for Education Statistics, Statistics of Public Schools (Fall 1970, 1971). Statistics of Public Elementary and Secondary Day Schools (fall, 1978, 1979). NCES, Digest of Education Statistics 1982, table 2, p. 7.

93. Interview with Carl Fynboe, then private school liaison for the Washington Department of Public Instruction, April 7, 1983.

94. See e.g., Santa Fe Community School v. New Mexico Board of Education, 85 N.M. 783, 518 P.2d 272 (N.M. 1974).

95. Educator and author John Holt, whose Boston-based organization, Holt Associates, provides support services for home instruction, estimates over 10,000 families educated their children illegally at home. Dr. Raymond Moore, a home schooling advocate, believes the number may be as high as 30,000. Colorado officials believe there are 200 to 300 families engaged in unapproved home instruction programs (approved is possible in Colorado) in the Grand Junction area alone. Denver Post, Nov. 29, 1981, sec. C, at 3, col. 4.

96. See Virginia Nordin and William Lloyd Turner, More Than Segregationist Academies: The Growing Protestants Fundamentalist Schools, 61 Phi Delta Kappan 391 (1980); Cooper, McLaughlin and Manno, supra note 69, at 97.

97. For a discussion of this phenomenon, see Dinah Wilev, State Boards of Education: Quality Leadership, Alexandria, VA: National Association of State Boards of Education, Inc., 1983; Jerome T. Murphy, ed., State Leadership in Education: On Being a Chief State School Officer, Washington, D.C.: Institute for Education Leadership, 1980. They attribute much of the new power of state boards to growth in federal programs.

98. Compare the discussion of compulsory education laws in Kotin and Aikman, supra note 30, written in 1980, with Patricia Lines, Private Education Alternatives and State Regulation, 12 J. of Law and Ed., 189-234 (April 1983). During this brief period the focus of these laws shifted from regulation of truants to regulation of schools.

99. Lines, supra note 98.

100. Lines, supra note 98.

101. See Lines, supra note 98.

102. See Lines, supra note 98, at 214-217.

103. Id.

104. S.D. Codified Laws Ann. sec. 13-27-3 (Supp. 1983).

105. S.B. 504, signed into law in May, 1984.

106. North Carolina General Statutes, sec. 155C-547 through 115C-555 (Cum. Supp. 1983). Alabama exempts church schools from its normal requirements for approval. See Ala. Code sec. 16-28-3 (Supp. 1983) (making an exception to certification requirements found at Ala. Code sec. 16-28-1 (Supp. 1982). Note that exempting schools based on religious affiliation raises some problems of favoring religion contrary to the first amendment.

107. The earlier law required "equivalency" as determined by the state board of education. See Vt. Stat. Ann. sec. 1121 (1974) (prior law). The new law strikes this provision and sets forth some minimal statutory requirements. Vt. Stat. Ann. secs. 906 and 1121 (Supp. 1983). See State v. LaBarge, 134 Vt. 276, 357 A. 2d 121 (1976) for the earlier history of these events.

108. H.B. No. 1346, signed June 3, 1983 (to be codified as Colo. Rev. Stat. sec. 22-33-110).

109. Ariz. Rev. Stat. Ann. sec. 15-310 (Supp. 1983).

110. Miss. Code Ann. sec. 37-13-99 (Supp. 1982). The law provides that nothing "shall ever be construed to grant, by implication or otherwise, to the State of Mississippi . . . any right or authority to control, manage, supervise or make any suggestion as to the control, management or supervision of any private or parochial school or institution for the education or training of children, of any kind whatsoever that is not a public school according to the laws of this state . . . .

111. See La. Rev. Stat. Ann. sec. 17:411 and 17:7(8) (West Supp. 1981) (prior law, requiring teacher certification).

112. Report of the Governor's Christian School Issue Panel, Jan. 26, 1984.

113. L.B. 928, signed into law, April 10, 1984.

114. The head of the education department at Notre Dame University evaluated Catholic schools with concern:

> [B]roadly considered, government schools are typically superior to Catholic schools at every level -- with, of course, many notable exceptions. Administrators, teachers, and guidance workers in government schools are typically better prepared professionally than their Catholic school counterparts. The pupil-teacher ratio in Catholic schools, particularly at the elementary level, is frightfully high. There is an almost unbelievable shortage of qualified guidance counselors. Too high a percentage of Catholic secondary schools are not regionally accredited.
>
> Lee, supra note 39, at 264.

He has also observed that

> Government schools have always taken the lead in all spheres of professionalization, especially in experimentation, in guidance, and in instructional services. Catholic schools generally have lagged behind, criticizing government schools for their innovational practices and ending up by tardily accepting these improvements.

Lee, supra note 39, at 258. However, these schools probably are getting better. Moreover, a substantial number of people think they are better. In a 1974 survey, 34% of those who

said they sent their children to Catholic schools did so primarily because they felt the children would received a better education; 19% did so primarily to assure religious instruction; 18% hoped mainly for more discipline. Andrew M. Greeley, William C. McCready and Kathleen McCourt, Catholic Schools in a Declining Church, Kansas City: Sheed & Ward, Inc., 1976, at 227.

115. See Charlie Euchner, "Private-School Officials Fear Reforms May Infringe Upon Their Autonomy," Education Week, Dec. 21, 1983, at 1, col. 1; CAPE outlook, no. 95, Nov. 1983, at 1 (newsletter of the Council for American Private Education).

116. James Coleman, Thomas Heffer and Sally Kilgore, Public and Private Schools, A Report to the National Center for Education Statistics Under Contract No. 300-78-0208; Chicago: National Opinion Research Center, 1981. For critiques of the report, see School Research Forum, April 1981 (published by Educational Research Service). I use the verb "claims" as Coleman's findings are disputed, especially on whether private schools better promote cognitive development.

117. Andrew M. Greeley and Peter H. Rossi, The Education of Catholic Americans, Chicago: Aldine Press, 1966. Andrew M. Greeley, The American Catholic, New York: Basic Books, 1977, at 112; Greeley, McCready and McCourt, supra note 114, at 225--227. Of course, socioeconomic characteristics of Catholics attending Catholic schools may influence their education and income attainment. In fact, the richest and poorest Catholics do not attend these schools; the middle income are more likely to do so. Greeley, supra, at 112.

118. Greeley, McCready and McCourt, supra note 114, at 44.

119. Greeley, McCready and McCourt, supra note 114, at 74.

120. The scant amount of testing evidence indicates that unapproved alternatives can be educationally adequate. One source of data comes from a handful of litigated cases, where "before and after" scores from standardized tests were introduced into evidence. E.g., in re Rice, 204 Neb. 732, 285 N.W.2d 223 (1979); State v. Shaver, 294 N.W.2d 883 (N.D. 1980). In one, a court found that a child kept in an unapproved school had made "remarkable progress" compared to her level of development in the public school. In re Rice, supra. In State v. Faith Baptist Church, the celebrated Nebraska case, the court considered some evidence -- testimony of a parochial school teacher -- that the children were receiving an adequate education but rejected it as irrelevant and not grounded on adequate expertise. 107 Neb. 802, 301 N.W.2d 571 (1981), 102 S. Ct. 75 (1981). Testing data from a Los Angeles home tutorial movement indicate that the children in the tutorial program scored higher than

children in the public schools, but there were no controls for socioeconomic status of the parents, and pretest data were not available. Weaver, Negri and Wallace, Home Tutorials vs. The Public School in Los Angeles, 62 Phi Delta Kappan 251 (1980).

121. See e.g. North Dakota v. Revinius, 328 N.W.2d 220 (N.D. 1982). Teachers were certifiable, but refused to obtain certificates for religious reasons. See also State v. Nobel, Nos. S 791-0114-A & S 791-0115-A (Mich. Dist. Ct., Allegon County, Dec. 12, 1979) (same; home instruction case).

122. This is not to say that the new schools reject accountability: many of the leaders in this movement have asked, in lieu of state certification requirements, for nationally standardized testing of their children to assure education accountability. They have requested testing in lieu of more onerous requirement during litigation. See, e.g. State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976); State v. Faith Baptist Church, 107 Neb. 802, 301 N.W.2d 571 (1981), appeal dismissed for want of a substantial federal question, 454 U.S. 803 (1981). Fundamentalist leaders also lobbied for this solution in North Carolina, Nebraska and other states, as an alternative to more onerous regulations.

123. Horace Mann, First Annual Report (1837). A published copy can be found in Cremin, Horace Mann, The Republic and the School, New York: Teacher's College, 1957, at 29, 33.

APPENDIX A

The sources for Figures One and Two are as follows:

Year	Public	Catholic	Nonpublic Non-Catholic	Total Private
1919-20	21,579,316 5	1,925,527 1		1,699,481 5
1929-30	25,678,000 5	2,464,467 1	186,517 E	2,651,044 5
1932-33				2,026,625 2
1939-40	25,433,542 5	2,396,305 1		
1940-41			205,000 E	2,611,047 2
1959-60	36,086,771 5			5,674,943 5
1960-61		5,253,791 1		5,236,480 2
1965		5,574,000 7	615,548 6	5,560,000 6
Fall 1969	45,618,578 5			5,500,000 5
1970-71	45,900,000	4,363,566 1		5,143,182 2
1975			1,433,000 6	
1976-77	44,317,000 3	3,404,386 4	1,661,782 4	5,167,000 3
1977-78	43,577,000 3	3,322,803 4	1,718,999 4	5,140,000 3
1978-79	42,611,000 3	3,251,583 4	1,820,000 7	5,084,297 2
1980-81			2,000,000 7	
1981-82			2,280,000 7	
1982-83		3,026,000 7		

[E]Estimated, based on other figures in this chart. Note that there are serious discrepancies between school populations reported from different sources, as a result, the nonpublic, non-Catholic figure would appear to be a negative amount on line 1.

[1]NCES, Digest of Educ. Stat., 1982, Table 42, p. 50 (this may exclude kindergarten).

[2]NCES, Private Schools in American Education, Jan. 1981, Table A, p. 15.

[3]Id., Table B.

[4]Id., Table E-4, p. 52 (enrollment in other religious schools and unaffiliated schools were added).

[5]NCES, note 1, table 3, at 8, includes K-12.

[6]Department of Health, Education and Welfare, National Center for Education Statistics, Statistics of Public Elementary and Secondary Day Schools 6 (1976).

[7]Based on an estimate by Bruce S. Cooper, Donald H. McLaughlin and Brunno V. Manno, extrapolating from a sample of 21 counties. They estimate the growth rate for non-Catholic private school pupils at 100,000 per year. Cooper and McLaughlin, and Manno, "The Latest Word on Private School Growth," They also note that the Teachers College Record, 85:1, fall, 1983, at 88-98. Total private school population generally experienced a small decline from 1965-66 to

1975-76, but began increasing after that date. They project a continued increase through 1990 for both Catholic and non-Catholic schools, although the projected increase in Catholic enrollments are based upon an assumption that the decline in enrollment has bottomed out, and that areas that are showing strong growth will continue to grow. Id. at 91 and 92. figure 1, at 96.